Imbangan Utama Sdn Bhd v Lotan Engineering Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WINDING UP COMPANY NO D1-28-828 OF 2000
VINCENT NG J
28 JANUARY 2002

Companies and Corporations — *Winding up — Petition — Petition under s 218 of Companies Act 1965 — Preliminary objection — Whether affidavit verifying petition affirmed on same date of petition in breach of r 26 of Companies (Winding-Up) Rules 1972 — Petitioner's affidavit in reply filed 17 days late, whether fatal — Whether court should cure procedural irregularities — Companies (Winding-Up) Rules 1972 r 26*

Companies and Corporations — *Winding up — Petition — Acknowledgement of debt signed under mistake — Respondent pleaded non est factum — Onus of proof — Whether challenge to winding up bona fide*

Companies and Corporations — *Winding up — Petition — Petition under s 218 of Companies Act 1965 — Counterclaim — Respondent company counterclaimed against petitioner for loss due to flooding of mines — No notice of claim filed — Whether right to set off arose*

The petitioner applied under s 218(1)(e) of the Companies Act 1965 ('the Act') to wind up the respondent company. The petition was grounded on acknowledgements of indebtness dated 24 February and 3 April 2000. The respondent raised two preliminary objections: (i) that the affidavit verifying the petition was affirmed on 28 September 2000, the same day as the date of the petition, in breach of r 26 of the Companies (Winding Up) Rules 1972 ('the Rules'); and (ii) that the affidavit in reply by the petitioner (encl 2B) was filed 17 days late. The respondent raised two issues to resist the winding up application, ie: (a) the respondent pleaded *non est factum* as they had signed the acknowledgement dated 3 April 2000 under mistake and without knowledge that the joint survey was not conducted; and (b) the respondent company had a counterclaim against the petitioner 'for loss due to the flooding of the mines'. The court allowed the petition and the respondent appealed.

Held:

(1) Under r 194 of the Rules, non-compliance with the rules of procedure, unless affecting merits or the jurisdiction of the court, was to be regarded as a mere irregularity and not a nullity. However, the curative powers of the court over such procedural irregularity must be exercised in a way which in all the circumstances best reflects the requirements of justice. The court must not only take into account prejudice to the interests of the applicant who sought the cure, but also the interest of the other parties and the interest of upholding the due administration of civil justice in general. In the absence of prejudice, the court may

discount any error, defect or irregularity whether in the decision or otherwise, not affecting the merits or the jurisdiction of the court — not to do so is to derogate from that discretion (see p 318A–C); *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 followed. Therfore, in the exercise of its discretion, the court under r 194 overruled the preliminary objections.

(2) The onus rests heavily and onerously on the party who alleged *non est factum*. The signer must establish his lack of competence due to illness or innate incapacity or defective education and he was not negligent or had acted nonchalantly or with want of care. And, he must further establish that he had thought that he was signing a document which was so radically or fundamentally or basically or essentially different in substance or in kind from the document signed. Also, if a man's signature on a document was obtained by fraud, or under the influence of mistake, or something of the kind, he may be able to avoid it up to a point, but not when it had come into the hands of one who had in all innocence advanced money on the faith of it being the signer's document, or otherwise had relied upon it as being the signer's document, as the latter had enabled it to be circulated by actually signing it. Thus, in a contest between the signer of a document and the innocent third party, the law has almost invariably chosen to prefer the latter (see pp 319D–G). In this case, the respondent had not attempted or even sought to discharge any of the aforestated onus. The respondent's plea of mistake or of *non est factum* was no defence to avoid a clear admission of due execution of a document of indebtedness. This challenge to a winding up order being made was not bona fide (see p 320B–C).

(3) As for the counterclaim, it was pertinent to note that until the date of hearing of the petition, there was neither any notice of claim sent to nor suit filed against the petitioner pertaining to any tortious acts or for breach of agreement. A counterclaim, if it exists, is a separate issue altogether especially where no claim has been filed by the petitioner under common law. The respondent had not shown any term in the contract (as there were no such terms) which gave them a right of set off or of defence (see p 320C–E).

[Bahasa Malaysia summary

Pempetisyen memohon di bawah s 218(1)(e) Akta Syarikat 1965 ('Akta tersebut') untuk menggulungkan syarikat responden. Petisyen tersebut berasaskan pengakuan keberhutangan yang bertarikh 24 Februari dan 3 April 2000. Responden telah membangkitkan dua bantahan awal: (i) bahawa afidavit menentusahkan petisyen yang telah disahkan pada 28 September 2000, iaitu tarikh petisyen tersebut, melanggar k 26 Kaedah-Kaedah (Penggulunggan) Syarikat

A 1972 ('Kaedah-Kaedah tersebut'); dan (ii) bahawa afidavit jawapan pempetisyen (kandungan 2B) telah difailkan 17 hari lewat. Responden telah membangkitkan dua isu untuk menentang permohonan penggulungan tersebut, iaitu: (a) responden telah memplid *non est factum* memandangkan bahawa mereka telah silap menandatangani pengakuan bertarikh 3 April 2000 dan 'without B knowledge that the joint survey was not conducted'; dan (b) syarikat responden mempunyai tuntutan balas terhadap pempetisyen 'for loss due to the flooding of the mines'. Mahkamah telah membenarkan petisyen tersebut dan responden merayu.

C **Diputuskan**:

(1) Di bawah k 194 Kaedah-Kaedah tersebut, ketidakpatuhan peraturan-peraturan prosedur, kecuali jika ia mempengaruhi merit-merit ataupun bidang kuasa mahkamah, akan dikira sebagai luar aturan dan bukan pembatalan. Walau bagaimanapun, kuasa D pembetulan mahkamah ke atas luar aturan prosedur sebegini mesti digunakan dalam cara yang mengikut keperluan keadilan memandangkan keadaan kes. Mahkamah bukan sahaja perlu mengambil kira prejudis kepada kepentingan pempetisyen, tetapi juga kepentingan parti-parti yang lain dan kepentingan menjaga pentadbiran keadilan sivil secara am. Dengan ketiadaan prejudis, E mahkamah boleh tidak mengambil kira kesilapan, kecacatan ataupun luar aturan yang tidak mempengaruhi merit atau bidang kuasa mahkamah — jika tidak, ini merupakan suatu kecacatan budi bicara (lihat ms 318A–C); *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 diikut. Oleh yang demikian, F dalam menggunakan budi bicaranya, mahkamah menolak bantahan awal di bawah k 194.

(2) Beban adalah pada parti yang menyatakan *non est factum*. Orang yang menandatangan perlu menunjukkan sikap yang kurang kompetennya oleh kerana kesakitan atau kecacatan atau G pendidikan yang defektif dan beliau tidak cuai atau bertindak tidak bertanggungjawab. Selain daripada itu, beliau perlu menunjukkan bahawa beliau percaya yang beliau menandatangani dokumen yang berbeza secara radikal, penting, pada dasarnya dan pada asasnya dalam isinya atau jenisnya daripada dokumen yang ditandatangani. Lagipun, jikalau H tandatangan seseorang telah diperoleh melalui fraud, atau silap, atau cara sebegitu, beliau mungkin dapat membatalkannya sehingga suatu tahap, tetapi tidak dapat membatalkannya jika ia diperoleh oleh seseorang yang telah membayar wang tanpa mengetahui keadaan yang sebenarnya dengan mempercayai bahawa ia merupakan dokumen orang yang menandatanganinya, I ataupun telah bergantung kepada dokumen tersebut sebagai dokumen orang yang menandatanganinya oleh kerana dokumen tersebut diedarkan kerana telah ditandatangan. Di dalam suatu

percanggahan di antara orang yang menandatangan dokumen tersebut dengan parti ketiga yang tidak bersalah, undang-undang memberi keutamaan kepada parti yang ketiga (lihat ms 319D–G). Di dalam kes ini, respondent tidak pernah mencuba melepaskan beban tersebut. Pli silap atau non est factum responden bukan merupakan pembelaan untuk mengelakkan pengakuan penyempurnaan dokumen keterhutangan yang jelas. Cabaran kepada perintah penggulungan tersebut tidak bona fide (lihat ms 320B–C).

(3) Mengenai tuntutan balas tersebut, perlu diambil perhatian bahawa tiada notis tuntutan yang disampaikan kepada pempetisyen atau guaman yang difail terhadap pempetisyen berkenaan dengan kelakuan tort atau untuk kemungkiran perjanjian. Tuntutan balas, jika ada, merupakan isu yang berasingan, terutamanya apabila pempetisyen tidak memfailkan sebarang tuntutan di bawah 'common law'. Responden belum menunjukkan sebarang terma perjanjian (oleh kerana tiada terma sebegitu) yang memberi kepada responden hak tolakan atau pembelaan (lihat ms 320C–E).]

Notes

For cases on petition for winding up, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 998–1039.

Cases referred to

Chai Then Song v Malayan United Finance Bhd [1993] MLJU 128 (refd)

Chin Yoon Timber Co v Overseas Lumber Bhd [1978] 2 MLJ 173 (refd)

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (refd)

Goh Jong Cheng v MB Melwani Pte Ltd [1991] 1 MLJ 482 (refd)

Imperial Guardian Life Assurance Society, Re (1869) IX LR 447 (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)

Lim Tok Chiow & Anor v Dian Tong Credit & Development Sdn Bhd [1994] 2 MLJ 345 (refd)

Mahkota Technologies Sdn Bhd v BS Civil Engineering Sdn Bhd (formerly known as The General Electric Co (M) Sdn Bhd [2000] 6 MLJ 505 (refd)

Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors [1996] 5 MLJ 345 (refd)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187 (refd)

Ming Lian Corp Sdn Bhd v Haji Noordin [1974] 1 MLJ 52 (refd)

Nicholls v Nicholls (1997) 147 NLJ 61 (refd)

Norwich and Peterborough Building Society v Steed (No 2) [1993] 1 All

ER 330 (refd)
Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (refd)
Petelin, Re (1975) 132 CLR 355 (refd)
Polygram Records Sdn Bhd v The Search & Anor [1994] 3 MLJ 127 (refd)
Saunders v Anglia Building Society [1971] AC 1004 (refd)
Sunshine Securities (Pte) Ltd, Re; Sunshine Securities (Pte) Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd [1978] 1 MLJ 57 (refd)
UMW Industries (1985) Sdn Bhd v Kamaruddin bin Abdullah & Anor 2 *Mallal's Digest* (4th Ed, 1998 Reissue) para 2558 (refd)
YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd) [1996] 2 MLJ 482 (refd)

Legislation referred to

Companies Act 1965 s 218(1)(e), (2)(a)
Companies (Winding Up) Rules 1972 r 26 r 194
Rules of the High Court 1980 O 2 r 1(1)

Gnanamalar P (*Zairina Loh & Wong*) for the petitioner.
Yusrin Faidz Yusoff (*Faidz Leong & Chong*) for the respondent.

Vincent Ng J: This is an appeal against my decision on 30 October 2001 allowing the petitioner's petition under s 218 of the Companies Act 1965 ('the Act') to wind up the respondent company. I would begin by stating the guiding principles governing such petitions. A winding up court should not allow itself to be used by an intended litigant as a machinery for trying a common law action or as a shortcut alternative to suing under common law on an alleged debt due (see *Re Imperial Guardian Life Assurance Society* (1869) (Vol IX) p 447 at p 450). Yet, if it is crystal clear that such debt is due, for example, upon clear uncontroverted evidence or acknowledgement of indebtedness on a quantified or liquidated sum, it would waste the civil courts' valuable time to require that the claimant/petitioner first proceed under common law and secure judgment on the debt before proceeding to petition to wind up the company. Indeed, such an approach would in effect render nugatory and purposeless s 218(1)(e) read in conjunction with s 218(2)(a) of the Act.

Firstly, a preliminary objection was taken by the respondent, being that the affidavit verifying the petition was affirmed on 28 September 2000, which was the same day as the date of the petition, in breach of r 26 of the Companies (Winding Up) Rules 1972 ('the Rules'). Counsel submitted that the key words are 'must be sworn after and filed within four days' (see *Lim Tok Chiow & Anor v Dian Tong Credit & Development Sdn Bhd* [1994] 2 MLJ 345 and *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173). I however decided to exercise my discretion under r 194 of the Rules to overrule this preliminary objection as I am obliged to apply the principles

laid down by the Federal Court in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (which adopted the landmark ratio in the judgment of Lord Woolf MR in *Nicholls v Nicholls* (1997) 147 NLJ 61), the principles being:

(i) although under O 2 r 1(1) [the equivalent being r 194 of the Rules] of the Rules of the High Court 1980 ('the RHC'), non-compliance with the rules of procedure is to be regarded as a mere irregularity and not a nullity, the curative powers of the court over such procedural irregularity must, in the words of Lord Woolf MR, 'be exercised in a way which in all the circumstances best reflects the requirements of justice'. And, in determining this, the court must not only take into account prejudice to the interests of the applicant who seeks the cure, but also the interest of the other parties and the interest of upholding the due administration of civil justice in general;

(ii) in the absence of prejudice, the court may discount 'any error, defect or irregularity whether in the decision or otherwise, not affecting the merits or the jurisdiction of the court' — not to do so is to derogate from that discretion;

(iii) thus, defects affecting merits or the jurisdiction of the court ought not to be cured in an exercise of discretionary power.

(See also *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 and *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482). The respondent's counsel then applied for his second and third preliminary objections (b) and (c) to be withdrawn — which was allowed. He then proceeded with his other preliminary objection (d), namely, that the affidavit in reply by the petitioner (encl 2B) was filed 17 days late on 13 December 2000 and should not be read at the hearing of the petition. This late filing was conceded by the petitioner's counsel, but he said this defect was waived by the respondent as they did not raise this issue in their subsequent affidavit, and in any event, the exclusion 'of encl 2B would not affect the merits of the petition. I again overruled this preliminary objection under (d) by adopting principle (ii) above and invoking r 194 of the Rules.

In the case at hand, the petition was based on s 218(1)(e) and grounded on an acknowledgement of indebtedness dated 24 February 2000 for RM125,348.76 by fax (exh 'LYH-7' of encl 2B) and a further acknowledgement dated 3 April 2000 for RM81,684.77 by letter signed by the director of the respondent company (exh 'LYH-8'). I had to allow the above petition as prayed as it is beyond question that the acknowledgement of indebtedness in both the respective sums was signed by an authorized officer of the company. This due execution of the acknowledgement was never denied or challenged and indeed, the second acknowledgement in the sum of RM81,684.77 was for a lesser amount because after the first acknowledgement, the respondent paid a sum of RM43,663.99 into account (see *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447).

A To resist the winding up application, the respondent raised only two issues for this court's adjudication, namely:

(a) while the respondent company acknowledged that they had signed the acknowledgement of debt dated 3 April 2000, they pleaded *non est factum* as they said that they had signed same under mistake
B and 'without knowledge that the joint survey was not conducted'; and

(b) the respondent company have a counterclaim against the petitioner 'for loss due to the flooding of the mines'.

C *On the first contention*

It really takes a litigant of unusual temerity or cheerful insouciance to register a plea of *non est factum*, for such plea rarely if ever succeeds. There is a whole pack of legal cards stacked against such plea. As a defence or a cause of action, the onus rests heavily and onerously on the party who
D alleges *non est factum*. The signer must establish his lack of competence due to illness or innate incapacity or defective education and he was not negligent or had acted nonchalantly or with want of care (see *Saunders v Anglia Building Society* [1971] AC 1004 (HL)). And, he must further establish that he had thought that he was signing a document which was so
E radically or fundamentally or basically or essentially different in substance or in kind from the document signed (see also *Polygram Records Sdn Bhd v The Search & Anor* [1994] 3 MLJ 127 and *Goh Jong Cheng v MB Melwani Pte Ltd* [1991] 1 MLJ 482). The effect of the doctrine must be kept within a very narrow field of application (see *Saunders* and *Petelin* (1975) 132 CLR 355), and such plea is unlikely to be successful (see *Norwich and*
F *Peterborough Building Society v Steed (No 2)* [1993] 1 All ER 330). It is also trite that if a man's signature on a document was obtained by fraud, or under the influence of mistake, or something of the kind, he maybe able to avoid it up to a point, but not when it has come into the hands of one who has in all innocence advanced money on the faith of it being the signer's document, or otherwise has relied upon it as being designer's document, as
G the latter had enabled it to be circulated by actually signing it. Thus, in a contest between the signer of a document and the innocent third party, the law has almost invariably chosen to prefer the latter.

The guiding principle which this court should adopt on this issue is as set out in *Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors* [1996]
H 5 MLJ 345; *UMW Industries (1985) Sdn Bhd v Kamaruddin bin Abdullah & Anor* 2 *Mallal's Digest* (4th Ed, 1998 Reissue) para 2558; *Saunders v Anglia Building Society* [1971] AC 1004; *Chai Then Song v Malayan United Finance Bhd* [1993] MLJU 128; *Ming Lian Corporation Sdn Bhd v Haji Noordin* [1974] 1 MLJ 52. In *UMW Industries* , in the dicta of Siti Norma Yaakob J
I (as she then was) it is pertinent to quote as follows:

> ... he has only himself to blame as the plea of non est factum does not work in favour of a person who has shown himself to be negligent.

In *Saunders*, it was also held that:

> A person who signs a document and parts with it so that it may come into other hands, has a responsibility, that of a normal man of prudence, to take care what he signs, which if neglected, prevents him from denying his liability under the document according to its tenor.

And therein, Lord Wilberforce went further to say:

> I would add that the onus of proof in this matter rests upon him (that is) to prove that he acted carefully, and not upon the third party to prove contrary.

Before me, the respondent had not attempted or even sought to discharge any of the aforestated onus. I would thus hold that the respondent's plea of mistake or of *non est factum* is no defence to avoid a clear admission of due execution of a document of indebtedness. In my view, this challenge to a winding up order being made is not bona fide (see *Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57). As for the counterclaim, it is pertinent to note that until the date of hearing of the petition, there was neither any notice of claim sent to nor suit filed against the petitioner pertaining to any tortious acts or for breach of agreement. It is trite that a counterclaim, if it exists, is a separate issue altogether especially where no claim has been filed by the petitioner under common law (see *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 and *Mahkota Technologies Sdn Bhd v BS Civil Engineering Sdn Bhd (formerly known as The General Electric Co (M) Sdn Bhd* [2000] 6 MLJ 505). Further, the respondent had not shown any term in the contract dated 16 September 1999 (as there were no such terms) which gave them a right of set off or of defence (see *Mahkota Technologies Sdn Bhd*).

In the event, prayers (a), (b) and (c) of encl 1 (the winding up petition) was allowed by this court.

Order accordingly.

Reported by Chew Phye Ken